IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

MISSISSIPPI DEPARTMENT OF FINANCE AND ADMINISTRATION, et al — APPELLANTS

vs. — CAUSE NO. 2022-SA-01129-SCT

PARENTS FOR PUBLIC SCHOOLS — APPELLEE

REPLY BRIEF OF APPELLANT MIDSOUTH ASSOCIATION OF INDEPENDENT SCHOOLS

FROM THE CHANCERY COURT OF HINDS COUNTY, MISSISSIPPI
FIRST JUDICIAL DISTRICT – CAUSE NO. 2022-705-M

ORAL ARGUMENT REQUESTED

M.E. BUCK DOUGHERTY III, TN BPR #022474
Admitted *pro hac vice*
LIBERTY JUSTICE CENTER
440 N. Wells Street, Suite 200
Chicago, Illinois 60654
Phone: (312) 637-2280
Email: bdougherty@libertyjusticecenter.org

BENJAMIN B. MORGAN, MSB #103663
BURSON ENTREKIN ORR MITCHELL & LACEY, P.A.
535 North Fifth Avenue
Laurel, Mississippi 39441
Phone: (601) 649-4440
Facsimile (601) 649-4441
Email: morgan@beolaw.com

Attorneys for Appellant Midsouth Association of Independent Schools

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Constitutional Provisions

Statutes

Rules

INTRODUCTION

This case begins and ends with a provision in Mississippi's constitution adopted in 1890. The Court must resolve the tension between a provision in Mississippi's constitution and the United States Constitution that has been festering for over a century. And there is no way to sidestep the issue.

Plaintiff-Appellee Parents for Public Schools claims that Section 208 of the Mississippi Constitution forbids the Legislature from appropriating funds to private schools. In defense against PPS's claims, Appellant Midsouth Association of Independent Schools—denied intervention by the chancery court as an Intervenor-Defendant—argues that Section 208 of Mississippi's constitution is a Blaine Amendment, born of racial and religious discrimination, that violates the federal Constitution.

Despite their diametrically opposed views on the same provision of the Mississippi constitution—Section 208—PPS inexplicably says that MAIS should not have been allowed to intervene, that its argument is "irrelevant," and that MAIS could "file its own lawsuit." But PPS cannot have it both ways: Section 208 either prevents the Legislature from giving $10 million in federal COVID-19 relief funds to MAIS's private member schools for their infrastructure—in which case PPS prevails on its claims—or it is a Blaine Amendment that violates the U.S. Constitution — and MAIS prevails in defense of PPS's claims. It is that simple.

From the record before the Court, it is clear that both PPS and the chancery court have failed to understand that MAIS has attempted to intervene in this case

as a *defendant*, not as a plaintiff. There would be no reason for MAIS to "file its own lawsuit." MAIS did not argue that it has a "claim." Rather, MAIS argued that it has a *defense*. And it had a legal right to intervene in this case to assert its defense to PPS's claims to protect its interest in $10 million that the Legislature expressly appropriated to MAIS for the benefit of its private member schools. Indeed, MAIS asserted as an affirmative defense in its proposed Answer that PPS may not rely upon Section 208 of the Mississippi Constitution to nullify the Independent Schools Program Legislation because Article 8, Section 208 violates the First and Fourteenth Amendments to the federal Constitution—a different *defense* from the defense raised by the State Defendants.

Specifically, MAIS argued in its Answer and briefing at the lower court and before this Court that the historical record shows that racial and religious discrimination toward immigrant Catholics and newly freed slaves—and the "sectarian" schools that dared to serve them in the Reconstruction period—were motivating factors in enacting Article 8, Section 208 of Mississippi's constitution in 1890—the same provision upon which PPS relies in support of its claims.

In contrast to MAIS's defense to PPS's claims, the State Defendants argued in their Answer that the Legislation does not violate Article 8, Section 208 of Mississippi's constitution because Section 208 only prevents "religious control" of State education funding to "sectarian schools," not indirect "support" for independent schools in general when funding is appropriated to a state agency. And they argued that the funds at issue were federal funds, not State funds.

Faced with *two* starkly different and independent *defenses* to PPS's claims resting on Article 8, Section 208 of the Mississippi Constitution—a defense under the federal Constitution raised by MAIS in its proposed Answer as an Intervenor-Defendant, and a separate defense raised by State Defendants in their Answer—the chancery court curiously concluded that *only one defense* to PPS's claims was needed to resolve the case: the State Defendants' defense, not MAIS's defense. And the chancery court's decision to deny intervention was also interwoven with federal law because the Chancellor concluded that MAIS's challenge to Section 208 of Mississippi's constitution based on the federal Constitution was "irrelevant."

Having discarded MAIS, preventing it from intervening in the case and raising its *federal Constitutional defense* to protect its interest in the $10 million in *federal funds* for its private member schools, the chancery court then decided that the State Defendants' defense on the merits was inadequate. The chancery court agreed with PPS and held that the Legislation violated Article 8, Section 208 of the Mississippi Constitution, nullifying the $10 million in federal funds appropriated by the Legislature for the benefit of MAIS's private member schools. Thus, the chancery court negated its basis for rejecting MAIS's intervention: the adequacy of the State Defendants' defense could not justify denying MAIS's intervention to raise an alternative defense if the State Defendants' argument was not, in fact, adequate.

The chancery court was wrong as a matter of law. This Court must reverse and hold that Article 8, Section 208 of the Mississippi Constitution does not bar the Legislature's appropriation of $10 million in federal COVID-19 relief funds to

MAIS's private member schools as PPS claims. That provision in Mississippi's constitution is a Blaine Amendment that violates the First and Fourteenth Amendments to the United States Constitution—a defense MAIS was entitled to raise in this case as an Intervenor-Defendant under Rule 24(a)(2).

ARGUMENT

I. The Chancellor erred by denying MAIS's motion to intervene as an Intervenor-Defendant, preventing it from asserting its Blaine Amendment defense to PPS's claims that rest on Section 208 of Mississippi's 1890 constitution.

The Chancellor erred by denying MAIS's motion to intervene as an Intervenor-Defendant, which prevented MAIS from asserting its Blaine Amendment defense to PPS's claims that rest on Section 208 of Mississippi's constitution.

First, MAIS has not waived argument on any mandatory prongs of intervention. In its opening brief and in accordance with M.R.A.P. 28(3), MAIS presented for review as its first issue, whether its motion to intervene of right under Rule 24(a)(2) — filed less than two months after the case originally commenced — was timely as a matter of law. MAIS's Br., p. 2. MAIS has not raised a new assignment of error or presented a new issue in this reply brief. Pursuant to M.R.A.P. 28(6), MAIS included a summary of its argument, suitably paragraphed to correspond with the first issue presented for review. MAIS summarized its first argument that "the trial court erred as a matter of law by denying MAIS's motion to intervene of right under Rule 24(a)(2)." MAIS's Br., p. 7. In its argument section pursuant to M.R.A.P. 28(7), MAIS included citations to applicable rules, statutes, case law, and the record, contending the trial court erred as a matter of law by denying MAIS's motion to

intervene of right under Rule 24(a)(2). MAIS' Br., p. 8-13. MAIS further included a standard of review that this Court should follow regarding MAIS's argument under Rule 24(a)(2). MAIS's Br., p. 4-5.

Further, in its memorandum of law filed in the chancery court in support of its motion to intervene of right under Rule 24(a)(2), MAIS argued that it satisfied all four factors for allowing intervention on the merits, including that: (1) its motion was timely based on the duration of time from when it first knew of its interest in the case until it filed its motion to intervene; (2) it had an economic interest of $10 million on behalf of its private member schools in accordance with the Legislation and a separate federal Constitutional interest not implicated by the existing parties in the action; (3) disposition of the matter would impede MAIS's ability to protect its $10 million interest; and (4) the State Defendants would not adequately represent MAIS's interests in the case because they were not going to raise MAIS's Blaine Amendment federal Constitutional defense. [C.P. 178-185].

Second, the Chancellor made no express finding on the first *Pittman* timeliness factor and rested her decision on another ground by applying an incorrect legal standard on the calculation of time. [C.P. 371-372]; *see Guaranty National Insurance Co. v. Pittman*, 501 So. 2d 377, 382 (Miss. 1987). Therefore, this Court must review de novo whether MAIS's motion to intervene of right under Rule 24(a)(2) was timely as a matter of law. *See Vasser v. Bibleway M.B. Church*, 50 So. 3d 381, 384 (Miss. Ct. App. 2010).

Third, MAIS has a $10 million interest in the case on behalf of its private member schools in accordance with the Legislation, and its Blaine Amendment defense is highly relevant to PPS's claims that rest on Section 208.

Fourth, MAIS's interest in the $10 million expressly appropriated by the Legislature was impeded because it cannot file its own lawsuit as a defendant, and it attempted to intervene in this case as an Intervenor-Defendant.

Fifth, the State Defendants could not—and actually did not—adequately represent MAIS's $10 million interest in the case because these officials did not assert a Blaine Amendment defense to PPS's claims.

A. Contrary to PPS's argument, the Chancellor's denial of intervention as of right should be reversed because MAIS has not waived essential arguments, and the Chancellor's decision is wrong as a matter of law.

MAIS has not waived essential arguments, and the Chancellor's denial of its motion to intervene of right under Rule 24(a)(2) is wrong as a matter of law.

1. MAIS has not waived argument on two mandatory prongs of intervention.

Contrary to PPS's arguments, MAIS has not waived essential arguments on two mandatory prongs of intervention.

M.R.C.P. 24(a)(2) requires a court to grant intervention when an applicant satisfies four criteria: (1) he must make timely application; (2) he must have an interest in the subject matter of the action; (3) he must be so situated that disposition of the action may as a practical matter impair or impede his ability to

protect his interest; and (4) his interest must not already be adequately represented by existing parties. *Pittman*, 501 So. 2d at 381.

These factors are evaluated on a sliding scale:

> Application of the rule requires that its components be read not discreetly, but together. A showing that a very strong interest exists may warrant intervention upon a lesser showing of impairment or inadequacy of representation. Similarly, where representation is clearly inadequate, a lesser interest may suffice as a basis for granting intervention.

Cummings v. Benderman, 681 So. 2d 97, 101 (Miss. 1996).

Under the timeliness factor, this Court in *Pittman* further adopted four additional factors used by the Fifth Circuit in determining whether an application for intervention is timely. 501 So. 2d at 381-82. These factors are: (1) the length of time during which the would-be intervenor actually knew or reasonably should have known of his interest in the case before he petitioned for leave to intervene; (2) the extent of the prejudice that the existing parties to the litigation may suffer as a result of the would-be intervenor's failure to apply for intervention as soon as he actually knew or reasonably should have known of his interest in the case; (3) the extent of the prejudice that the would-be intervenor may suffer if his petition for leave to intervene is denied; and (4) the existence of unusual circumstances militating either for or against a determination that the application is timely. *Id.* at 382 (citing *Stallworth v. Monsanto Co.* 558 F.2d 257, 264-66 (5th Cir.1977)) (additional citations omitted).

Where the trial court fails to make a timeliness determination or support it with sufficient findings, Mississippi courts have adopted the Fifth Circuit's analysis and apply a de novo standard of review. *Vasser*, 50 So. 3d at 384.

Here, PPS incorrectly asserts that MAIS's opening brief "waives argument on two of the four timeliness factors and two indispensable prerequisites for intervention as of right." PPS's Resp. Br., 27-29. To support its incorrect assertion, PPS cites two cases that do not support this contention.

First, PPS cites *Sanders v. State* — a criminal case that does not address intervention under Rule 24 — for the proposition that this Court "will not consider issues raised for the first time in an appellant's reply brief." 678 So. 2d 663, 669-70 (Miss. 1996); *see also Biegel v. Gilmer*, 329 So. 3d 431, 434 (Miss. 2020). PPS's Resp. Br., 28. Because MAIS sufficiently raised assignment of errors in its opening brief and has not raised any new issues in its reply, PPS's argument is a non-starter. *Sanders* also noted the defendant appealing his conviction failed to raise his speedy trial assignment of error at the lower court, but attempted to do so in his appeal for the first time in his reply brief. *Id.* at 670. But that is not the issue here because MAIS argued all four factors of intervention on the merits, as well as timeliness at the chancery court below. [C.P. 178-187]. *Sanders* is inapplicable and does not support PPS's contention.

Second, PPS cites *Hood ex rel. State Tobacco Litigation* for the proposition that "all four requirements for intervention must be satisfied to support intervention of right." 958 So. 2d 270, 808 (Miss. 2007); PPS's Resp. Br., 28-29. But *Hood* actually

discusses the four timeliness factors under *Pittman*, not factors relating to intervention as of right on the merits. *Id.* In other words, by citing *Hood* PPS conflates the four *Pittman* timeliness factors that case discussed with the four *Pittman* factors on the merits of intervention, of which timeliness is one factor.

Additionally, *Hood* actually supports MAIS's position on its first issue presented on appeal because the *Hood* intervenors, including the Governor, were allowed to intervene *four years* after they reasonably should have known of their interest in the case. *Id.* at 806-07 (emphasis added). Surely if the Governor of Mississippi was allowed to intervene in a case four years after its interest was triggered, then MAIS should have been allowed to intervene to protect its $10 million interest for its private member schools, a mere 57 days after PPS commenced its lawsuit.

And, again, MAIS expressly argued all four factors of intervention as of right on the merits at the chancery court. [C.P. 178-187]. But the chancery court failed to even address MAIS's argument on two intervention factors on the merits: the second factor analyzing MAIS's interest in the subject matter of the action, and the third factor as to whether MAIS was so situated that disposition of the action may practically impair or impede its ability to protect its interest [C.P. 371-72].

As further discussed below, of the factors the chancery court cursorily mentioned, the court failed to do so with sufficient findings, applied an incorrect legal standard, or rested its decision on other grounds.

2. PPS failed to respond to MAIS's argument that the trial court applied an incorrect legal standard by calculating the length of time before trial from the time MAIS filed its motion to intervene.

PPS has failed to respond to MAIS's argument that the chancery court applied an incorrect legal standard by calculating the length of time before trial from the time MAIS filed its motion to intervene.

Echoing the chancery court's improper legal analysis, PPS continues to incorrectly argue that "MAIS waited until just twelve days before trial to file its Motion to Intervene, despite its knowledge of Plaintiff's challenge and request for preliminary injunction," yet PPS cites to the legal standard in *Pittman*, which does not support PPS's argument. PPS's Resp. Br., 29; [C.P. 371]. PPS cites no case law supporting its contention that the correct legal standard on timeliness to intervene should be measured from the time MAIS filed its motion to intervene until trial. That is because no such authority exists.

As MAIS argued in its opening brief, measuring the length of time from the date MAIS filed its motion to intervene until the consolidated trial date under Rule 65 is not the correct legal standard to determine whether its motion to intervene was timely under the *Pittman* factors. MAIS's Br., 9-11; 501 So. 2d at 381-82. Rather, under the first *Pittman* factor on timeliness, courts are to calculate "the length of time during which the would be intervenor actually knew or reasonably should have known of his interest in the case before he petitioned for leave to intervene." *Id.* Under the correct legal standard—the first *Pittman* factor—MAIS's motion to intervene was timely: MAIS filed its intervention motion 57 days after PPS

initiated its lawsuit, which is a significantly shorter time period than others this Court has deemed timely as a matter of law. MAIS's Br., 10-11.

The chancery court failed to apply this correct legal standard. And PPS cites no case law in support of changing and altering this well-settled legal standard on the proper way to measure and calculate the duration of time when analyzing the timeliness factor under Rule 24.

a. This Court must review de novo the timeliness issue because the Chancellor made no express finding on the first *Pittman* factor and rested her decision on another ground.

This Court must review de novo whether MAIS's intervention motion was timely because the Chancellor made no express finding on the first *Pittman* factor and rested her decision on another ground.

The first *Pittman* factor addresses how courts are to measure the length of time when analyzing whether a motion to intervene is timely: courts must measure "the length of time during which the would be intervenor actually knew or reasonably should have known of his interest in the case before he petitioned for leave to intervene." 501 So. 2d at 381-82.

But the Chancellor made no express finding on this factor and instead rested her decision on another ground. Regarding MAIS's motion to intervene of right under Rule 24(a)(2), the Chancellor held:

> The principal defect in MAIS's motion is that it is untimely. MAIS waited until just twelve days before trial to file its Motion to Intervene, despite its knowledge of Plaintiff's challenge and request for preliminary injunction.

[C.P. 371]. Thus, instead of calculating the duration of time when MAIS actually knew or reasonably should have known of its interest in the case before filing its motion to intervene, as the first *Pittman* factor requires—57 days after PPS initiated its lawsuit—the Chancellor instead rested her decision on another ground: the duration of time between MAIS's filing of its motion to intervene and the trial date. That is not one of the *Pittman* timeliness factors.

Where, as here, "the chancellor made no express finding on any of the timeliness factors but instead rested her decision on another ground," an appellate court must review denial of intervention based on timeliness de novo. *Vassar*, 50 So. 3d at 384.

i. The Chancellor also rested her decision to deny intervention on the merits of MAIS's challenge to Section 208, concluding it was "irrelevant," which warrants review.

In its opinion denying MAIS's motion to intervene under Rule 24(a)(2), the Chancellor said, "The portion of Section 208 that MAIS challenges as violating the federal constitution is irrelevant to the subject of this case." [C.P. 371]. Thus, the Chancellor's decision to deny intervention based on the merits of MAIS's Blaine Amendment challenge to Section 208 warrants review by this Court.

It is true that courts can and should avoid needless opinions on matters of federal law where they can dispose of a case on an adequate and independent state ground. *See Michigan v. Long*, 463 U.S. 1032, 1040 (1983); *see also Caldwell v. Mississippi*, 472 U.S. 320 (1985). But the United States Supreme Court will review a state court decision if it "fairly appears to rest primarily on federal law, or to be

interwoven with the federal law. [A]nd when the adequacy and independence of any possible state law ground is not clear from the face of the opinion, [the U.S. Supreme Court] will accept as the most reasonable explanation that the state court decided the case the way it did because it believed that federal law required it to do so." *Long,* 463 U.S at 1041.

Here, like in *Long* and *Caldwell,* from the face of the opinion denying MAIS's motion to intervene, the Chancellor's decision fairly appears to be interwoven with federal law. The chancery court's opinion denying intervention, ostensibly based on timeliness, is not clear and does not appear to rest on adequate and independent state grounds. In PPS's view, "the Chancellor's Order made findings on all four timeliness factors," and the "decision was well explained." PPS's Resp. Br., 30-31. PPS attributes any assignment of error of the chancery court order denying intervention merely to "MAIS's retelling." PPS's Resp. Br., 30. As discussed above, that is not the case as MAIS points out because the Chancellor applied an incorrect legal standard on the timeliness factor and rested her decision on another ground.

And a closer look at the Chancellor's order and opinion denying MAIS's motion to intervene reveals that the court's decision was also interwoven with federal law because the Chancellor said MAIS's Blaine Amendment federal Constitutional challenge to Section 208 was "irrelevant." [C.P. 371]. The most reasonable explanation for the Chancellor's statement in its opinion is that the court skipped ahead to review the merits of MAIS's Blaine Amendment argument and concluded that federal law required her to deny intervention. *See Long,* 463 U.S. at 1041.

First, "relevancy" is not one of the *Pittman* factors under state law to determine whether MAIS should have been allowed to intervene. Mississippi intervention law does not require a court to make findings and conclusions of law on the merits of a proposed intervenor's claim or defense. But the Chancellor reviewed MAIS's federal Constitutional challenge to Section 208 and concluded such a challenge was "irrelevant," and, therefore, denied intervention. Thus, the court's decision to deny MAIS's motion to intervene under Rule 24(a)(2) was interwoven with federal law.

Second, MAIS had asserted its Blaine Amendment challenge to Section 208 as its First Affirmative Defense in its proposed Answer to PPS's claims, attached as an exhibit to MAIS's motion to intervene. MAIS asserted that "Miss. Const. Art. VIII, § 208, on which the Complaint relies, is an unconstitutional abridgement of MAIS' First and Fourteenth Amendment rights under the U.S. Constitution." [C.P. 149]. In its response opposing MAIS's motion to intervene, PPS briefed counterarguments to MAIS's Blaine Amendment argument. [C.P. 301-309]. And in the court's opinion denying MAIS's motion to intervene, the Chancellor expressly addressed MAIS's challenge to "Section 208" and argument that it violates "the federal constitution," but did not cite any Mississippi case law or clearly ground her decision denying intervention on state law when she concluded MAIS's argument was "irrelevant."

Third, MAIS further briefed its Blaine Amendment defense argument and the tension and interplay between Section 208 and the federal Constitution, in its memorandum of law opposing PPS's motion for an injunction on the merits. [C.P. 159-74]. Notably, although it had denied MAIS's motion to intervene and MAIS was

not a party to the case as a potential intervenor at that point, in its separate merits opinion issued two days after denying intervention, the chancery court continued to discuss MAIS. For example, the Chancellor opined that a "significant majority" of MAIS's member schools "have a religious or sectarian character." [E.P. 386, n. 3]. Indeed, the Chancellor noted the "challenged legislative scheme is likely constitutionally suspect under Section 208's prohibition on funding for sectarian schools, as many grant-eligible private schools, including Midsouth Association of Independent Schools ("MAIS") member schools, have a religious or sectarian character." [E.P. 386, n. 3]. State law was not cited to support the Chancellor's opinion that the Legislation appropriating $10 million in federal COVID-19 relief funds for MAIS's private member schools was "likely constitutionally suspect under Section 208's prohibition on funding for sectarian schools."

ii. The Chancellor was wrong to deny MAIS's motion to intervene because she deemed its Blaine Amendment federal Constitutional challenge to Section 208 as "irrelevant."

In the chancery court's order denying intervention under Rule 24(a)(2), the Chancellor said, "The portion of Section 208 that MAIS challenges as violating the federal constitution is irrelevant to the subject of this case." [C.P. 371]. The Chancellor was wrong because MAIS's defense to PPS's claims was relevant. Section 208 of Mississippi's constitution adopted in 1890 is a Blaine Amendment that violates the First and Fourteenth Amendments to the federal Constitution.

The United States Supreme Court has long recognized the rights of parents to direct "the religious upbringing" of their children. *Wisconsin v. Yoder*, 406 U.S. 205,

213-14, 232 (1972). Parents exercise that fundamental right by choosing to send their children to religious schools, a choice protected by the federal Constitution. *See Pierce v. Society of Sisters*, 268 U.S. 510, 534-35 (1925). "A State need not subsidize private education. But once a State decides to do so, it cannot disqualify some private schools solely because they are religious." *Espinoza v. Montana Dep't of Revenue*, 140 S. Ct. 2246, 2261 (2020).

Judges in every state are bound by the Supremacy Clause of the United States Constitution. *Id.* at 2262. And when courts are "called upon to apply a state law no-aid provision to exclude religious schools from the program, [those courts are] obligated by the Federal Constitution to reject the invitation" as a violation of the Free Exercise Clause of the First Amendment. *Id.*

In *Espinoza*, the U.S. Supreme Court applied strict scrutiny and invalidated a Montana "no-aid" provision to religious schools like the no-aid provision in Section 208 of Mississippi's constitution. *Id.* at 2260, 2263. The *Espinoza* Court struck down Montana's no-aid provision because it penalized parents' decisions to send their children to private schools "by cutting families off from otherwise available benefits if they choose a religious private school rather than a secular one, and for no other reason." *Id.* at 2261.

The Chancellor was bound by the Supremacy Clause to apply *Espinoza* and grant MAIS's motion to intervene to allow it to defend and protect its interest in $10 million appropriated by the Legislature to its private member schools for infrastructure projects. *See id.* at 2262. From the face of the opinion denying MAIS's

motion to intervene, the Chancellor clearly recognized a conflict between state and federal law because she proceeded to opine on both *state and federal law*. Instead of granting MAIS's motion to intervene, the Chancellor denied MAIS's motion and said, "The portion of Section 208 that MAIS challenges as violating the federal constitution is irrelevant to the subject of this case." [C.P. 371]. In other words, the Chancellor conducted an examination of the briefs before her, including MAIS's Blaine Amendment challenge to Section 208, applied state and federal law, and decided MAIS's federal Constitutional challenge to Section 208 was "irrelevant."

But under *Espinoza* the Chancellor was wrong because MAIS's federal Constitutional challenge to Section 208's no-aid provision is highly relevant to PPS's claims. Section 208 of Mississippi's constitution states:

> No religious or other sect or sects shall ever control any part of the school or other educational funds of this state; nor shall any funds be appropriated toward the support of any sectarian school, or to any school that at the time of receiving such appropriation is not conducted as a free school.

Miss. Const. Ann. art. 8, § 208. The Chancellor was "called upon" by PPS to apply Mississippi's no-aid provision that excludes religious and sectarian schools—such as MAIS's private member schools—to nullify Legislation appropriating $10 million in federal funds for the benefit of MAIS's private member schools. *See Espinoza*, 140 S. Ct. at 2262. As *Espinoza* teaches, the chancery court was "obligated by the Federal Constitution to reject the invitation" because Section 208 is a Blaine Amendment, like Montana's no-aid provision, that violates the First and Fourteenth Amendments. *See id.* The court failed to reject PPS's invitation, applied Section

208's no-aid provision, and blocked $10 million in federal COVID-19 relief funds that the Legislature expressly appropriated for MAIS's private member schools.

To add insult to injury, after denying MAIS's motion to intervene, in the chancery court's merits opinion two days later, the Chancellor said the Legislation appropriating $10 million to MAIS's private member schools "is likely constitutionally suspect under Section 208's prohibition on funding for sectarian schools" because a "significant majority" of MAIS's member schools "have a religious or sectarian character." [E.P. 386, n. 3].

b. The length of time from when MAIS first knew of its interest in the case before it filed its motion to intervene — 57 days after PPS filed its lawsuit — is deemed timely under controlling precedent.

MAIS's motion to intervene was timely as a matter of law because it was made 57 days after PPS filed its lawsuit.

PPS attempts to fashion an argument that decisions by this Court that found motions to intervene filed more than 57 days after a lawsuit was filed to be timely somehow do not support finding that MAIS's motion was timely. PPS's Resp. Br., 33. According to PPS, those decisions do not support MAIS's argument because they analyzed timeliness *in the context of the case's progression*. PPS's Resp. Br., 33.

But this Court has never identified "context of the case's progression" as a factor to analyze when courts consider timeliness under Rule 24, either under the *Pittman* timeliness factors or otherwise. Thus, PPS's argument is unavailing because controlling precedent does not recognize "context of the case's progression" as a valid factor for courts to weigh when analyzing timeliness under Rule 24.

c. Prejudice is tethered to timeliness at the moment the intervenor attempts to intervene, and, because MAIS's motion to intervene was timely on the day it filed, the existing parties were not prejudiced.

The prejudice analysis is tethered to the timeliness factor. Because MAIS's motion to intervene was timely filed 57 days after PPS commenced its lawsuit, its intervention in the lawsuit would not have prejudiced the existing parties.

Prejudice to existing parties is determined based on the delay by the intervenor "in the prosecution of claims or defenses in the pending action." *Pittman*, 501 So. 2d at 382. Prejudice is only relevant if it is caused by the potential intervenor's failure to act promptly. *Id.* Prejudice "is measured as of the date of the filing of the motion for leave to intervene." *Id.*

The chancery court failed to properly assess prejudice to the existing parties "as of the date of [MAIS] filing [its] motion for leave to intervene." *See id.* Instead, the court analyzed prejudice by focusing on the day of "trial and a final outcome" instead of the date MAIS filed its motion to intervene. [C.P. 371]. This was improper under *Pittman*. PPS likewise frames its prejudice argument relative to "on the day of trial." PPS's Resp. Br., 34-35. But PPS makes no reference to how it was prejudiced on the very day MAIS filed its motion to intervene in the case, which is fatal to PPS's prejudice argument.

d. The third and fourth timeliness factors weigh in favor of MAIS and do not support the Chancellor's decision to deny intervention.

PPS is simply wrong regarding the third and fourth timeliness factors and whether MAIS has previously argued these points. PPS's Resp. Br., 35-36. In fact,

MAIS briefed these issues in its memorandum of law supporting intervention. [C.P. 178-187]. Indeed, the four *Pittman* timeliness factors and the four *Pittman* intervention factors on the merits were fully briefed and front and center before the chancery court. But the court never cited *Pittman* in its order denying MAIS's motion to intervene, nor did it expressly analyze prejudice to MAIS. Instead, it analyzed prejudice to the existing parties and the court itself. MAIS's Br. 12-13; [C.P. 369-372].

Under *Pittman*, the third and fourth timeliness factors respectively concern prejudice to MAIS if intervention is denied, and the existence of unusual circumstances militating for a determination that the application to intervene is timely. 501 So. 2d at 382.

For brevity, MAIS highlights these points below from its full briefing argument in its memorandum of law supporting intervention that was filed in the chancery court and that is part of the record before this Court. [C.P. 178-187].

Prejudice to MAIS

MAIS is an association of educational institutions designated as a recipient of $10 million in federal funds by the Legislature. MAIS has an economic interest in this case. PPS by its lawsuit seeks to nullify these federal funds appropriated to MAIS's private member schools. PPS seeks to do so via the so-called Blaine Amendment, Miss. Const. art. VIII, § 208. [C.P. 180]. MAIS's private member schools stand to lose $10 million in one-time infrastructure grant funds because of this case. [C.P. 180]. This is not a contingent concern, as in *Perry County v.*

Ferguson, 618 So. 2d 1270, 1273 (Miss. 1993); such a loss of funds will be the direct and immediate result of an adverse judgment.

MAIS also has a federal Constitutional right to assert under the First and Fourteenth Amendment based on a challenge to Miss. Const. art. VIII, § 208. [C.P. 180]. This is a federal Constitutional right not implicated for the existing parties. And it is a legally protectable interest providing grounds for intervention as of right by an intervenor party who holds the constitutional right. *See, e.g., United States v. Aref*, 533 F.3d 72, 81 (2d Cir. 2008) (media granted intervention in criminal proceeding to assert a First Amendment claim); *In re AP*, 162 F.3d 503, 513 (7th Cir. 1998) (same). This separate federal Constitutional interest gives MAIS a "direct, substantial, legally protectable interest" in the proceedings. *Perry County v. Ferguson*, 618 So. 2d 1270, 1272 (Miss. 1993). Moreover, MAIS is directly named in the Legislation: an "Eligible independent school" means "any private nonpublic school operating within the State of Mississippi that: is a member of the Midsouth Association of Independent Schools (MAIS) and located in the State of Mississippi . . . ." Miss. Code Ann. § 37-185- 3(c)(i).

Finally, trade associations often intervene to defend the interests of their members and overall industry in litigation. *See, e.g., Araujo v. Bryant*, 283 So. 3d 73, 76 (Miss. 2019) (Mississippi Charter Schools Association, in case against state defendants); *Kinney*, 202 So. 3d at 197 (Mississippi Association of Planning and Development Districts, in case involving an individual district); *Delta Elec. Power Ass'n v. Miss. Power & Light Co.*, 149 So. 2d 504, 506 (1963) (Mississippi Municipal

Association, concerning electric power in a city). MAIS's members are the "primary intended beneficiaries" of the law—"[t]hey therefore assert not only a matter of public interest but matters more relevant to them than to anyone else." *Brumfield v. Dodd*, 749 F.3d 339, 344 (5th Cir. 2014).

If the State Defendants lose at the chancery court—which they did—the Legislature (which is not even a party here), will lose out on seeing its desired public policy accomplished. But MAIS's private-school members are the real ones who will be injured, as they will lose out on $10 million in federal grant funds.

Further, the State Defendants did not challenge Section 208 based on a Blaine Amendment argument. Only MAIS would make the federal Constitutional argument. Only MAIS can protect its interests against the prejudice that will result from a negative ruling.

Unusual Circumstances

As it argued in its memorandum of law, there are no unusual circumstances militating for or against intervention. Thus, the majority of the operative *Pittman* factors militate in favor of a finding of timeliness on MAIS's motion to intervene. [C.P. 180].

3. MAIS has a $10 million interest in the case on behalf of its private member schools, and its Blaine Amendment defense is highly relevant to PPS's claims that rest on Section 208.

Again, MAIS has a $10 million interest in the case on behalf of its private members schools, and its Blaine Amendment defense is highly relevant to PPS's claims that rest on Section 208.

4. MAIS's $10 million interest was impeded because it was not allowed to intervene as an Intervenor-Defendant and assert its Blaine Amendment defense to PPS's claims, and it cannot file its own lawsuit as a defendant.

Again, MAIS's $10 million interest was impeded because it was not allowed to intervene as an Intervenor-Defendant and assert its Blaine Amendment defense to PPS's claims, and it cannot file its own lawsuit as a defendant.

The Mississippi Rules of Civil Procedure provide for parties to raise in pleadings a "claim" and a "defense." *See* M.R.C.P. 8(a) and (b). When a party is a defendant in an action, the "party shall state in short and plain terms his defenses to each claim asserted and shall admit or deny the averments upon which the adverse party relies." M.R.C.P. 8(b). The defendant may also set forth specific affirmative defenses. *See* M.R.C.P. 8(c).

MAIS attempted to intervene in the case as an Intervenor-Defendant to assert a defense to PPS's claims, and MAIS filed an Answer in accordance with the Rules. [C.P. 149-152]. MAIS's Answer further asserted its Blaine Amendment affirmative defense challenging Section 208 under the federal Constitution. [C.P. 149]. In its Answer, MAIS did not assert a counterclaim against PPS, nor did it assert a third-party claim against the State Defendants, which it would have been required to do if it had a claim. [C.P. 149-152]. *See* M.R.C.P. 8(a). From the record before this Court, it is clear that MAIS attempted to intervene in the case as a defendant to assert a defense, not to assert a claim.

Despite the clear record that MAIS attempted to intervene to assert a defense, and not a claim, to protect its $10 million interest, the chancery court denied intervention and said that MAIS "may still file a separate lawsuit." [C.P. 371]. Likewise, PPS argues that MAIS "easily could protect its interest by filing its own lawsuit." PPS's Resp. Br., 38.

Both the chancery court and PPS are wrong. As a defendant under the Rules, MAIS cannot file a separate lawsuit. And even if it could, this Court has held that the "mere availability of alternative forums is not sufficient to justify denial of a motion to intervene." *Pittman*, 501 So. 2d at 384. Moreover, this Court has further held intervention was justified when it would "eliminate a separate suit, decrease litigation expenses for the parties, relieve the court system from multiple actions, and prevent the risk of inconsistent judgments, thereby furthering the stated purpose and spirit of our Rules." *Madison HMA, Inc. v. St. Dominic-Jackson Mem. Hosp.*, 35 So. 2d 1209, 1217 (Miss. 2010).

5. The State Defendants could not — and actually did not — adequately represent MAIS's $10 million interest in the case because these officials did not assert a Blaine Amendment defense to PPS's claims.

The record is further clear that the State Defendants did not assert a Blaine Amendment defense to PPS's claims as MAIS would have. Thus, the State Defendants could not and did not adequately represent MAIS's interests.

B. Like in *Brumfield*, MAIS staked out a defense significantly different from the State Defendants, warranting intervention.

The State Defendants failed to file a response at the chancery court opposing MAIS's motion to intervene, but in their opening brief suddenly change course. State Defendants' Br., 35-38. The State Defendants are wrong on intervention.

Government officials cannot adequately represent an intervening party's interest when the intervenors "are staking out a position significantly different from that of the state." *Brumfield v. Dodd*, 749 F. 3d 339, 346 (5th Cir. 2014) (holding parent recipients of private school vouchers were wrongly denied intervention and reversing the lower court). Here, MAIS staked out a defense that was significantly different from the State Defendants' defense, warranting intervention. *See id.*

II. PPS's theories of standing fail under established law.

PPS fails both prongs of *Araujo*: its members did not contribute the funds in question, and those funds were not diverted from their children's public schools. *See generally Araujo v. Bryant*, 283 So. 3d 73 (Miss. 2019); MAIS's Br., 13-20.

III. If it determines intervention was not warranted, the Court should adopt the State Defendants' defense.

If it determines intervention was not warranted, the Court should adopt the State Defendants' defense so that MAIS's private member schools receive $10 million in federal COVID-19 funds appropriated for their benefit. MAIS's Br., 20-38.

CONCLUSION

For these reasons, Appellant MAIS requests that this Court REVERSE the decision of the lower court.

Respectfully submitted, this, the **27th** day of **September 2023.**

MIDSOUTH ASSOCIATION OF
INDEPENDENT SCHOOLS

/s/ M.E. Buck Dougherty III

/s/ Benjamin B. Morgan

OF COUNSEL:

M.E. BUCK DOUGHERTY III, TN BPR #022474
Admitted *pro hac vice*
LIBERTY JUSTICE CENTER
440 N. Wells Street, Suite 200
Chicago, Illinois 60654
Phone: (312) 637-2280
Email: bdougherty@libertyjusticecenter.org

BENJAMIN B. MORGAN, MSB #103663
BURSON ENTREKIN ORR MITCHELL & LACEY, P.A.
535 North Fifth Avenue
Laurel, Mississippi 39441
Phone: (601) 649-4440
Facsimile: (601) 649-4441
Email: morgan@beolaw.com

Attorneys for Appellant Midsouth Association of Independent Schools

CERTIFICATE OF SERVICE

I, Benjamin B. Morgan, do hereby certify that I have this date filed the foregoing document with the Clerk of Court using the MEC system, which will send a true and correct copy to all counsel of record.

I further certify that I have this date mailed, by United States Mail, postage prepaid a true and correct copy of the above and foregoing to the following:

Honorable Crystal Wise Martin
Presiding Judge
P.O. Box 686
Jackson, MS 39205-0686

This, the **27th** day of **September, 2023**.

/s/ Benjamin B. Morgan